FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

Roccine Taylor,

Petitioner(s)

v.

William J. Henderson,
In his official capacity as
Postmaster General for the
United States,

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

# PETITION FOR WRIT OF CERTIORARI

# SUPPLEMENT TO THE APPENDIX

Roccine Taylor
6347 Meadowbrook Road
Garfield Hts., OH 44125
(216) 475-4864

Petitioner, *Pro Se*

5908

## Opinion Below

(1) The Court of Appeal Rehearing denied on September 7, 2000 (App. 1)

(2) United States District Court, Magistrate Jack B. Streepy, Report and Recommend Decision of Magistrate Judge, February 3, 1999. (App. 2-6)

(3) United States District Court, Judge Donald C. Nugent, notice of marginal entry order, July 8, 1998. (App. 7)

(4) United States District Court, Judge Donald C. Nugent, Order, July 6, 1998. (App. 8-17).

(5) United States District Court, Judge Donald C. Nugent, Judgment Entry, July 6, 1998. (App. 18).

(6) United States District Court Judge Donald C. Nugent, Judgment Entry, July 6, 1998. (App. 19-20).

(7) United States District Court Magistrate Judge Jack B. Streepy, Report and Recommend Decision of Magistrate Judge, June 22, 1998 (App. 21-29).

(8) United States District Court Magistrate Judge Jack B. Streepy, Report and Recommended Decision of Magistrate Judge, June 11, 1998 (App. 30-35).

(9) United States of America Merit System Protection Board, Dissenting opionion of member Antonio C. Amador; Opinion and Order, June 19, 1997. (App. ).

(10) United States of America Merit Systems Protection Board Central Regional Office, Initial Decision, November 21, 1996. (App.36-56).

(9) United States of America Merit System Protection Board, Dissenting opionion of member Antonio C. Amador; Opinion and Order, June 19, 1997. (App. ).

(10) United States of America Merit Systems Protection Board Central Regional Office, Initial Decision, November 21, 1996. (App. ).36-56)

App.1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| ROCCINE TAYLOR, | ) | FILED:SEP.7,2000 |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| WILLIAM J. HENDERSON, in his official capacity as Postmaster General for the United States, | ) | |
| | ) | |
| | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

Before: KRUPANSKY, NORRIS, and SUHRHEINRICH, Circuit Judges.

Roccine Taylor moves for reconsideration for this court's prior order, which affirmed the dismissal of her civil rights action filed under diverse theories of state and federal law.

Upon review, we conclude that Taylor has not cited any misapprehension of law or fact that would alter our prior decision. *See* Fed. R. App. P.40 (a).

Accordingly, the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

App.2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
EASTERN DIVISION

| | |
|---|---|
| ROCCINE TAYLOR, | )FILED:FEB3,1999 |
| | ) 1:97CV1884 |
| Plaintiff-Appellant) | |
| | ) JUDGE DONALD E. |
| v. | ) NUGENT (Magistrate |
| | ) Judge Jack B. Streepy) |
| MARVIN T. RUNYON, | ) |
| etc. | )REPORT AND |
| | )RECOMMENDED |
| Defendant | )DECISION OF |
| | )MAGISTRATE JUDGE |

STREEPY, MAG. J.

By previous court order, counts one, four, five, and eight through fifteen have been either dismissed or summary judgment granted thereon. (See docs. 29, 30, 35.) Defendant has now filed a motion to dismiss the remaining claims, i.e., counts two, three, six and seven (doc. 41). The plaintiff, Roccine Taylor (Taylor), has filed a counter motion for summary judgment (doc.42) and arguably two motions to amend the complaint (docs. 32, 33).

Defendant's Motion

Defendant has moved to dismiss the remaining counts on the ground that the complaint fails to state a cause of action upon which relief can

be granted. Taylor has not filed a response to this motion.

The remaining counts are listed in the complaint (see complaint at 37) as "Denied Rights as a Preference Eligible Veteran" (count two), "Denied Rights under the Collective Bargaining Agreement" (count three), "Denied All Procedural Rights" (count six), and "Prohibited Personnel Practices" (count seven).

Count two and six allege that Taylor was denied certain procedural and substantive rights that are due postal workers such as herself. Exhibit 13 attached to the complaint, thus considered to be a part of the complaint, shows the Merit Systems Protection Board (MSPB) found in Taylor's favor and ordered that she be reinstated to her former employment position with back pay.

As a result of the MSPB decision, Taylor has not suffered any denial of her procedural and substantive rights that the MSPB has failed to remedy. Accordingly, counts two and six do not state claims upon which relief may be granted.

Count three contends that Taylor was denied rights under a collective bargaining agreement. The complaint alleges that Taylor was subject to such an agreement which called for a grievance procedure. (See complaint at ¶ 33.) Prior to bringing a federal suit, Taylor must exhaust remedies under that agreement. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 219 (1985); Kaiser v. United States Postal Services, 908 F.2d. 47, 49 (6th Cir. 1990), cert. denied, 498

(1991); White v. General Electric Co., 121 F.3d 710, 1997 WL 437092 (6th Cir. 1997) (TABLE, text in WESTLAW).

The complaint does not allege that Taylor exhausted the grievance procedure or whether the outcome was binding. Assuming the grievance procedure was exhausted and not binding, there is no allegation in the complaint of how the collective bargaining agreement was violated. Taylor has failed to state a claim in count three upon which relief can be granted.

The remaining count, count seven, alleges prohibited personnel practices as outlined by 5 U.S.C. §§2302 (b) (4), (b) (8) (A), (b) (9) and (b) (10). (Complaint at ¶77.) The postal service is exempt from this provision, see Booker v. Merit System Protection Board, 982 F.2d 517, 519 (Fed. Cir. 1992), cert. denied, 510 U.S. 862 (1993); see also Van Werry v. Merit System Protection Board, 995 F.2d 1048, 1951-52 (Fed. Cir. 1993); Medden v. Runyon, 899 F.Supp. 217, 225 (E.D.Pa. 1995). Count seven should be dismissed.

## Plaintiff's Motion

Taylor has filed a counter-motion for summary judgment. The basis of her motion is not clear. Her claim that defendant has failed to filed an answer is not well taken. (See doc. 13.) Her other allegations are not relevant to her motion is not clear. Her claim that defendant has failed to file an answer is not well taken.

doc. 13.) Her other allegations are not relevant to her of defendant's motions.

Taylor filed objections to each report and recommendation (docs. 32, 33). In addition to clearly identifying those documents as objections, she titled each as a motion to amend her complaint. (Id.)

It appears the motions to amend were implicitly denied when the court adopted each report and recommendation. Assuming there has not been a ruling, said motions to amend should be denied in that Taylor did not set forth the legal requirements for amending her complaint, much less show why she should be permitted to amend.

## RECOMMENDATION

It is recommended that defendant's motion to dismiss the remaining claims of the complaint (doc.41) be granted and that plaintiff's motions for summary judgment (doc.42) and to amend the complaint (docs. 32, 33) be denied. This recommendation disposes of the entire case.

Dated: February 3, 1999

Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d.

App.6

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | )1:97CV1884 |
| | ) |
| Plaintiff | ) |
| | )JUDGE DONALDC. |
| v. | )(Magistrate Judge |
| | ) Jack B. Streepy) |
| MARVIN T. RUYON, | ) |
| etc. | ) |
| Defendant | ) |

ORDER

STREEPY, MAG. J.

The above matter was referred by the court for a report and recommended decision, a pretrial hearing or other preliminary matters. This matter has now been concluded, therefore;

IT IS ORDERED that the case referral order is hereby terminated, and the case is returned to the referring judge.

Dated:FEB.3,1999 Jack B. Streepy

United

StateMagistrate

Judge

App.7

UNITED STATES DISTRICT COURT
NORTHERN DISTICT OF OHIO

IN THE MATTER OF: Case : 1:97-cv-01884

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Judge Donald C. Nugent -pre
Mag. Judge Jack B. Streepy -ref

Taylor- plaintiff

v.

Runyon- defendant

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-

NOTICE OF MARGINAL ENTRY ORDER

Notice To:

Roccine Taylor
6347 Meadowbrook Road
Garfield Heights, OH 44125

** The following ruling was made on 7/8/98 and entered on the docket:

MARGINAL ENTRY ORDER denying in part & granting in part motion by pltf to amend init cmp part II [33-1]. Gr as to mot to amd init cmp & gr to obj's to R&R dec part II. (issued on 7/8/98) Judge Donald C. Nugent

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | )CASE NO. 1:97CV1884 |
| | ) |
| Plaintiff, | )JUDGE DONALD C. |
| | )NUGENT |
| v. | ) |
| | ) |
| MAFRVIN T. RUNYON) | |
| Postmaster General , | )MEMORANDUM |
| | )OPINION AND ORDER |
| Defendant | ) |

This matter comes before the Court on two Reports and Recommendations (Documents #29 and #30) of a Magistrate Judge of this Court, the first Report (Document #29) submitted on June 11, 1998 recommended that Defendant's Motion for Partial Dismissal (Document #14) be granted: and the second Report (Document #30) submitted on June 22, 1998 recommended that Defendant's Motion for Summary Judgment (Document #21) be granted. For the reasons that follow both Reports and Recommendation are hereby ADOPTED by this Court, along with the findings of fact and conclusions of law therein.

Plaintiff Roccine Taylor filed this *pro se* action on July 18, 1997, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

2000e-16(c), the Federal Tory Claims Act, 28 U.S.C. § 1346(b), and the Fifth and Fourteenth Amendments to United States Constitution. Plaintiff alleges that Marvin T. Runyon, in his capacity as Postmaster General for the United States, wrongfully suspended and removed her from her position as a postal clerk and retaliated against her for filing an EEOC complaint.

Specifically, Plaintiff filed a thirty-nine (39) page Complaint and on page thirty-seven (37) lists the following causes of action:

(1) Denied Due Process;
(2) Denied Rights As a Preference Eligible Veteran;
(3) Denied Rights Under the Collective Bargaining Agreement;
(4) United States Constitution 5th Amendment;
(5) United States Constitution 14th Amendment;
(6) Denied All Procedural Right;
(7) Prohibited Personal Practices;
(8) Discriminatory Retaliation;
(9) Defamation, Libel, Slander;
(10) Tort of Outrage-Reckless Disregard a Sufficient [*sic*];
(11) Tort of Intentional Infliction of Emotional Distress;
(12) Negligent Infliction of Emotional Distress;
(13) Mental Distress;
(14) Outrageous Conduct;
(15) Mental Distress.

Defendant filed a Motion for Partial Dismissal (Document #14) on December 24, 1997. Plaintiff filed a "Motion to Dismiss Defendant's Motion for Partial Dismissal and a Motion to Strike Defendant's Statements of Facts" on December 30, 1997. Thereafter, Defendant filed a Motion for Summary Judgment (Document #21) on March 6, 1998. Plaintiff filed a Response to Defendant's Motion for Summary Judge Jack B. Streepy for the preparation of a Report and Recommendation. *See* 28 U.S.C. §636(b); Local R. 7.3. Magistrate Judge Streepy issued two Reports and Recommendations, the first Report recommended Defendant's Motion for Partial Dismissal be granted and the second Report recommended Defendant's Motion for Summary Judgment be granted. Plaintiff filed Objections to the Reports and Recommendations. The Reports and Recommendations of The Magistrate Judge, along with Plaintiff's Objections are herein reviewed by this Court.

**Factual Background**

The following factual summary is based on depositions, affidavits and exhibits filed in this case as well as the very thorough and complete review of the facts in the Reports and Recommendation of Magistrate Judge Streepy. Those material facts which are controverted and supported by deposition testimony, affidavit, or

favorable to Plaintiff, the non-moving party.

Plaintiff initiated an informal discrimination complaint against the United States Postal Service (hereinafter "USPS") with an Equal Employer Opportunity Commission (hereinafter "EEOC") counselor on September 26, 1995. Plaintiff complained to the EEOC about her numerous conflicts with her supervisor Ms. Deborah Noe. The EEOC counselor's report reflects that Ms. Noe was interviewed regarding Plaintiff's complaint. On December 28, 1995, the EEOC filed a formal discrimination complaint against the USPS, based on Ms. Noe's action.

On January 12, 1996, Plaintiff's daughter, Ms. Buchanan telephoned Mr. Bradfield, a manager at USPS. Ms. Buchanan was upset about the problems her mother was having with her USPS supervisors. During the conversation, Ms. Buchanan told Mr. Bradfield she had a gun and threatened to shoot "those people," referring to the USPS managers involved. Ms Buchanan admits making this threat.

Plaintiff learned of her daughter's threats as she referred to them in two statements she made to USPS employees. Ms. Eileen Corman states that Plaintiff told her "[n]ow things have moved from the back burner to the front burner. They weren't going to pay [for sick time] and all of a sudden they pay me. My daughter told someone she would shoot someone." Plaintiff also talked to Custodian Clyde Brown who states that Plaintiff said her daughter had further stated that if anything happened to her daughter were passed on shoot

The USPS conducted a comprehensive investigation and sent Plaintiff a copy of its memorandum. The investigation corroborated the charges in the amended notice. Thus, a notice was sent to Plaintiff of a proposal to remove her from the USPS for conduct unbecoming to a postal worker and for threatening harm to postal employees. On June 8, 1996, the USPS sent Plaintiff a "letter of decision" stating that, after consideration of "all evidence of record, including [her] personal response [which contained] no affidavits or other documentary evidence on [her] behalf," it found the charges against her were "fully supported by the evidence," thus she was removed effective June 14, 1996. The letter informed Plaintiff of her right to appeal the decision to the Merit System Protection Board (hereinafter "MSPB").

Plaintiff filed an appeal. The Administrative Law Judge (hereinafter "ALJ") reversed her suspension on procedural grounds, but affirmed her removal. The ALJ further found that there was no evidence that Plaintiff had been suspended or terminated in retaliation for filing her EEOC complaint.

Plaintiff sought review by the MSPB. The MSPB reversed the ALJ's decision regarding Plaintiff's removal, finding that the USPS had failed to present adequate evidence at the hearing. The MSPB affirmed the remainder of the ALJ's decision, noting in part that Plaintiff had not even contested that portion of the decision which rejected her retaliation claim.

The MSPB ordered the USPS to cancel Plaintiff's suspension, effective January 13, 1996, and to reinstate her effective June 14, 1996. It also awarded Plaintiff back pa with interest and benefits due.

## Standard of Review for Magistrate Judge's Report and Recommendation

The applicable district court standard of review for a magistrate's report and recommendation depends upon whether objections were made to that report. When objections are made to a report and recommendation of a magistrate judge, the district court reviews the case *de novo*. FED.R.CIV.P.72(b) provides this standard of review; it states, in pertinent part, the following:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any
> Portion of the magistrate judge's disposition to which specific written
> Objection has been made in accordance with this rule. The district judge
> may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Accordingly, this Court will review the Reports and Recommendation, to which timely

*Support Systems*, Inc. v. N.L.R.B., 7 F.3d 511 (6th Cir. 1993).

**Conclusion**

The court has reviewed both Reports and Recommendations of the instant case *de novo*. *See Massey v. City of Ferndale*, 7 F.3d 506 (6th Cir. 1993). The Court has also considered all of the pleading, affidavits, motions, and filings of the parties. This Court adopts the findings of fact and conclusion of law of the Magistrate Judge as its own.

In the first Report and Recommendation, Magistrate Judge Streepy correctly determined that Plaintiff's constitutional and state tort claims lack jurisdiction, and as such, Defendant's Partial Motion to Dismiss should be granted. In *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court declined to create a cause of action for federal employees whose constitutional rights have been violated in the workplace. The Court found that "[b]ecause such claims arise out of an employment relationship that is govern by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," supplementing that regulatory scheme with a new judicial remedy would be inappropriate. *Id.* at 368.

Next, Plaintiff claims the Magistrate Judge erred in recommending that Counts Nine through Fifteen, Plaintiff's state common law claims, are preempted by the PRA and the CSRA. Plaintiff contends that the court has jurisdiction over her tort claims under the FTCA. The Magistrate Judge did not err. The comprehensive scheme provided by the PRA and CSRA preempts Plaintiff's claims under the FTCA. *American Postal Workers*, 940 F.2d at 708. Thus, Plaintiff's Counts Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen are DISMISSED.

Therefore, Defendant's Partial Motion to Dismiss is GRANTED. Accordingly, Plaintiff's constitutional and state tort claims, Counts One, Four, Five, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen are DISMISSED.

In the Second Report and Recommendation, Magistrate Judge Streepy correctly determined that Plaintiff failed to raise a genuine issue of any material fact that she was suspended and removed in retaliation for filing a complaint with EEOC, and as such, Defendant's Motion for Summary Judgment on Count Eight should be granted.

Plaintiff contends that Defendant retaliated against her when she filed a complaint with the EEOC. A plaintiff must prove retaliation by the method set in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under federal law, "(1) the plaintiff must establish a *prima facie* case of retaliation; (2) the employer must articulate some legitimate, nonretaliatory reason for

the contested employment action; and (3) the plaintiff must prove that the stated reason was in fact pretext for retaliation." *Johnson v. University of Wisconsin-EAU Claire*, 70 F.3d 469, 478 (7th Cir.). At all times, the Plaintiff bears the burden of persuading the trier of fact that the Defendants intentionally discriminated against her. *Texas Dep't. of Community Affairs v.Burdine*, 450 U.S. 248 (1981). Defendant does not claim that plaintiff is unable to establish a *prima facie* case. Rather, Defendant claims Plaintiff was removed for legitimate, nondiscriminatory reasons, and Plaintiff has no evidence of pretext.

To meet this burden of production, Defendant "need no persuade the [trier of fact] that [he] was actually motivated by the proffered reasons,...but need only to produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [retaliatory] animus." *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266 (6th Cir. 1986) (quoting *Burdine*, 450 U.S. at 254, 257), Defendant states that Plaintiff was removed because of the comments of her daughter and what she stated to employees.

Plaintiff is required to "offer some evidence that Defendant's explanation is pretextual." *Greer v. Sears Roebuck & Co*,No. 94-5502, 1995 WL 283778 at *3 (6th Cir. May 10, 1995). Plaintiff cannot rely on the proximity in time between the date she filed her EEOC complaint and of retaliation, it is not evidence of

*Shamrock Chems.Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

Plaintiff argues that Mr. Bradfield's description of Ms. Buchanan's statement is inadmissible hearsay under Federal Rule of Evidence 803(3). The Magistrate Judge correctly determined that this statement is not hearsay since it is offered for its effect on the listener.

Upon a review of the evidence, Plaintiff has not met her burden. Plaintiff has failed to submit any evidence of pretext. The uncontradicted record reflects that on the dates of suspension and removal, the USPS had credible evidence to the effect that Plaintiff's daughter had threatened to shoot USPS supervisors, and Plaintiff approved of her daughter's threats and made a similar threat.

Therefore, Plaintiff has failed to raise a genuine issue of any material fact that she was suspended and removed in retaliation for filing a complaint with the EEOC. Accordingly, Defendant's Motion for Summary Judgment is GRANTED as to Count Eight.

For the foregoing reasons, the Reports and Recommendations of Magistrate Judge Streepy are hereby ADOPTED. Accordingly, Defendant's Partial Motion to Dismiss and Defendant's Motion for Summary Judgment are GRANTED.

IT IS SO ORDERED.

DATED: July 6,1998

DONALD C. NUGENT

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | ) 1:97CV1884 |
| | ) |
| Plaintiff, | ) JUDGE DONALD |
| | ) C. NUGENT |
| v. | ) |
| | ) |
| MARVIN T. RUNYON, | ) |
| Postmaster General , | ) |
| | ) JUDGEMENT |
| Defendant, | ) ENTRY |

Pursuant to the Memorandum Opinion and Order of this Court, the Reports and Recommendations of Magistrate Judge Jack B. Streepy (Documents #29 and #30) are ADOPTED. This Court adopts the findings of fact and conclusions of law of Magistrate Judge Streepy as its own.

Consistent with this ruling, Defendant's Motion for Partial Dismissal (Document #14) and Defendant's Motion for Summary Judgment (Document #21) are GRANTED.

Therefore, the remaining issues and claims are returned to Magistrate Judge Jack B. Streepy for pretrial supervision.

IT IS SO ORDERED. DONALD C. NUGENT
United States District
Judge

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | ) 197CV1884 |
| | ) |
| Plaintiff-Appellant, | ) JUDGE DONALD |
| | ) C. NUGENT |
| v. | ) |
| | ) |
| MARVIN T. RUNYON, | ) ORDER |
| Postmaster General for the | ) |
| | ) |
| Defendant, | ) |

The above captioned case is herby returned to Magistrate Judge Jack B. Streepy for pre-trial supervision on the remaining issues (Counts Two, Three, Six, and Seven). The Magistrate Judge is hereby authorized pursuant to the above provisions to: 1) hold a Case Management Conference and Status Hearing; (2) enter and enforce non-dispositive pretrial orders including, but no limited to, orders pertaining to discovery matters; (3)sign all stipulated orders; and (4) rule on all non-dispositive conduct and any necessary evidentiary hearing or other appropriate proceeding," Local R. 5:1.1(h), and file with the Court a report containing his proposed findings and recommendation

App.20

for disposition of case-dispositive motions. The Court reserves the right to rule directly on any matter filed in the within matter.

This case to be returned to this Court when ready for trial unless all parties consent to trial before Magistrate Judge Streepy.

IT IS SO ORDERED.

DONALD C. NUGENT
United States District Judge

DATED: JULY 6,1998

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | )DATE:JUNE22,1998 |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) ORDER |
| | ) |
| WILLIAM J. HENDERSON, in his official capacity as Postmaster General for the United States, Defendant-Appellee. | ) |

Before: KRUPANSKY, NORRIS, and SUHRHEINRICH, Circuit Judges.

The above matter was referred by the court for a report and recommended decision, a pretrial hearing, or other preliminary matters. This matter has now been concluded, therefore;

IT IS ORDERED that the case referral order is hereby terminated, and the case is returned to the referring judge.

Jack B. Streepy
United States Magistrate Judge

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | )1:97CV1884 |
| | ) |
| Plaintiff, | )JUDGE DONALD |
| | )C. NUGENT |
| v. | )(Magistrate Judge B. |
| | )Streepy) |
| MARVIN T. RUNYON, etc. | ) |
| Postmaster General , | )REPORT AND |
| | )RECOMMENDED |
| Defendant, | )DECISION OF |
| | )MAGISTRATE |
| | )JUDGE |

STREEPY, MAG. J.

Roccine Taylor (Taylor), brings this pro se complaint pursuant to 5 U.S.C. §7703 (b) (2); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (c); the Federal Tort Claims Act, 28 U.S.C. §1346 (b); and the Fifth and Fourteenth Amendments to the United States Constitution. Taylor is an employee of the United States Postal Service (USPS). The complaint names Marvin T. Runyon (Runyon), in his capacity as Postmaster General for the United States, as defendant. The complaint alleges a total of fifteen causes of action alleging various constitutional, tort, and statutory claims all related to Taylor's suspension and removal from her position as a postal clerk.

Incorporated by reference (and attached hereto) is a prior report and recommendation (R&R) that recommends Runyon's motion to dismiss ten causes of action, the constitutional and tort claims, be granted. Five causes of action, designated in the R&R as counts two, three, six, seven, and eight, were not subject to that motion. Currently pending is Runyon's motion for summary judgment (doc.28) on count eight, the retaliation claim which alleges Taylor was suspended and removed in retaliation for filing a claim of discrimination against the USPS.

Summary judgment is appropriate where the entire record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). Non-moving parties may rest neither upon the mere allegations of their pleadings nor upon general allegations that issues of fact may exist. See Bryant v. Commonwealth of Kentucky, 490 F.2d 1273 (6th Cir. 1974). Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), holds that:

> ...Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

The evidence need not be in a form admissible at trial in order to avoid summary judgment, but Rule 56(e) requires the opposing party

to go beyond the pleadings and by [his] own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

The Sixth Circuit in Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989), has interpreted Celotex and two related cases, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co., Ltd. V. Zenith Radio, 475 U.S.574 (1986), as establishing a "new era" of favorable regard for summary judgment motions. Street, at 1479-80, sets forth ten "new era" principles:

1. Complex cases are not necessarily inappropriate for summary judgment.

2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

3. The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent,

having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

6. As on federal directed verdict motions, the "scintilla rule" applies, i.e., the respondent must adduce more than a scintilla of evidence overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but

must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10. The trial court has more discretion than in the "old era" in evaluation the respondent's evidence. The respondent must "do more that simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is "implausible."

## I. The Relevant Evidence

On September 26, 1995, Taylor initiated an informal discriminaion complaint against the USPS with an Equal Employment Opportunity Commissioner (EEOC) counselor. Taylor primarily complained to him about her supervisor, Deborah Noe (Noe). The counselor's report, dated December 5, 1995, reflects that Noe was

interviewed regarding Taylor's complaint. (Complaint exhibit, hereafter PX, III.)[1] A formal EEOC discrimination complaint against the USPS, based primarily on Noe's actions, was filed on December 18, 1995.

On January 12, 1996, Taylor's daughter Briggitte Buchanan (Buchanan), telephoned John Bradfield, a manager at USPS whom Buchanan knew. (Defendant's exhibit, hereafter DX, A at 53.) Buchanan was upset about the problems her mother, Taylor, was having with her USPS supervisors. During the conversation, Buchanan told Bradfield she had a gun and threatened to shoot "those people," referring to the USPS managers involved. (PX IX at D-E.) Buchanan admits making this threat. (Id. at E-F.)

There is evidence that Taylor soon learned of her daughter's threats because she referred to them in two oral statements she made the same day or the next day to USPS employees.

Eileen Corman (Corman) states that Taylor told her "[n]ow things have moved from the back burner to the front burner. They weren't going to pay me [for sick time] and all of a sudden they pay me. My daughter told someone she would shoot someone." (Id. at F.) Custodian Clyde Brown states that Taylor said her daughter had told "someone downtown" she was going to shoot Noe and another USPS supervisor. Taylor said if anything happened to her daughter, she was going to shoot "that guy."

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1. Both Taylor and Runyon rely primarily on the exhibits attached to the complaint.

thus summary judgment should be entered on the eighth count.

C. Jurisdiction

If the two dispositive motions are granted, four claims remain. None of the four remaining claims allege retaliation. The Federal Circuit Court of Appeals, as opposed to A district court, has exclusive jurisdiction over appeals from final orders of MSPB which do not raise claims of retaliation. 5 U.S.C. §7703 (b) (2) vests jurisdiction in the district court if the order involves a claim of retaliation or, as in this case, if it is mixed with nonretaliation claims. See Afiffi v. United States Dep't of Interior, 924 F.2d 61, 63 (4th Cir. 1991). retaliation for the following reasons. The reversal was not based on contrary evidence, rather, it was due to a procedural error and failure to call a witness. Moreover, despite reversing the suspension and termination, the MSPB found there was no evidence of retaliation, and Taylor has failed to submit any evidence not considered by the MSPB.

Once the retaliation claim has been disposed of, e.g., on a motion for summary judgment, the district court has discretion whether to retain jurisdiction over the other claims or transfer them to the Federal Circuit. I.d. at 64. In exercising that discretion, the district court is

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2. The MSPB reversal of the suspension a termination does not constitute evidence of

guided by factors analogous to those considered in determining whether to retain jurisdiction over pendent state claims after dismissing a plaintiff's federal claims: judicial economy, convenience, fairness to the litigants, and concern for a uniform federal personnel policy. I.d. at 64. It appears that the remaining claims will be decided by the court on the basis of an administrative appeal rather than by a de novo trial. See Ali v. Brown, ____ F.Supp. - ____, 1998 WL 136227, *12 (N.D. I11. 1998). The circumstances herein mandate that this district court retain jurisdiction over th remaining claims. Id. at *10-11; contra Williams v. USPS, case Nos. 92-0404, 1992 WL 296541 (E.D.Pa. Oct. 8, 1992).

## RECOMMENDATION

It is recommended that Runyon's motion for summary judgment on ground eight, Taylor's retaliation claim, be granted and that the district court retain jurisdiction over the remaining counts.

Jack B.Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | |
|---|---|
| ROCCINE TAYLOR, | )1:97CV1884 |
| | ) |
| Plaintiff | )JUDGE DONALD |
| | )C. NUGENT |
| v. | )(Magistrate Judge |
| | )Jack B. Streepy) |
| MARVIN T. RUNYON, | ) |
| Postmaster General , | )REPORT AND |
| | )RECOMMENDED |
| Defendant, | )DECISION OF |
| | )MAGISTRATE |
| | )JUGDE |

STREEPY, MAG. J.

The plaintiff, Roccine Taylor (Taylor), brings this pro se action pursuant to 5 U.S.C. §7703 (b) (2), Title VII OF THE civil Rights Act of 1964, 42 U.S.C. 2000e-16 (c), the Federal Tort Claims Act, 28 U.S.C. §1346 (b), and the Fifth and Fourteenth Amendments Runyon, in his capacity as Postmaster General for the United States, as defendant.

Currently pending are (1) Runyon's motion (doc.14) to dismiss Taylor's constitutional and state tort claims for lack of jurisdiction pursuant to Rule 12 (b) (1); and (2) Taylor's motion (doc.15) to dismiss Runyon's motion pursuant to Rule 12(b) (6) and to strike Runyon's statement of the facts pursuant to Rule 12 (f).

Essentially, the complaint alleges Taylor, a black female, was an employee of the United States Postal Service (USPS) who became involved in numerous conflicts with her supervisors, during the course of which she complained to the Equal Employment Opportunity Commission (EEOC). The confrontations culminated in her suspension and subsequent termination.

Taylor appealed her suspension and removal to the Merit Systems Protection Board (MSPB), claiming, inter alia, retaliation for filing her EEOC complaint. The MSPB initially reversed her suspension but affirmed her removal. Upon further review, the MSPB reversed Taylor's removal, affirmed the remainder of the initial decision, and ordered the USPS to reinstate Taylor with back pay, including interest and benefits due.

The complaint is 39 pages in length. On page 37 it lists the following as the causes of action:

[1] Denied Due Process;
[2] Denied Rights As a Preference Eligible Veteran;
[3] Denied Rights Under the Collective Bargaining Agreement;
[4] United States Constitution 5th Amendment;
[5] United States Constitution 14th Amendment;
[6] Denied All Procedural Right;
[7] Prohibited Personal Practices;
[8] Discriminatory Retaliation;
[9] Defamation, Libel, Slander;
[10] Tort of Outrage-Reckless Disregard a Sufficient [*sic*];

[11] Tort of Intentional Infliction of Emotional Distress;
[12] Negligent Infliction of Emotional Distress;
[13] Mental Distress;
[14] Outrageous Conduct;
[15] Mental Distress

Ruyon's Motion

Runyon concedes there is jurisdiction over some claims in the complaint, i.e. those brought pursuant to 5 U.S.C. §7703. However, he contends the court lacks jurisdiction over many of the fifteen claims. He offers authority that dismiss the claims, but not for jurisdictional reasons.

First, Ruyon contends "Congress Has Enacted A Comprehensive Remedial (Def.'s brief at 6.) Taylor's first, fourth, and fifth causes of action are constitutional claims.[1]

In Bush v. Lucas, 462 U.S. 367 (1983), the Supreme Court declined to create a cause of action for federal employees whose constitutional rights have been violated in the workplace. The court found that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies again against the United States," supplementing that regulatory scheme with a new judicial remedy would be inappropriate. Id. at 368. The regulatory scheme discussed in Bush includes the

seq.

Bush has been applied to the USPS, which is governed by the Postal Reorganization Act (PRA) and sections of the CSRA incorporated therein. The PRA and CSRA remedies constitute a "comprehensive scheme governing employment relations within the Postal Service" American Postal Workers Union, 940 F.2d 704, 708 (D.C. Cir. 1991). As a result, Bush has been applied to preclude a constitutional cause of action against the USPS. Rather, Taylor is limited to the remedies provided by the comprehensive scheme under PSA and CSRA. See Bradley v. United States Postal Service, 832 F.2d 1061, 1062 (8th Cir. 1987); Roman v. United States Postal Service, 832 F.2d 1061, 1062 (8th Cir. 1987). Accordingly, her first, fourth and fifth causes of action fail to state a claim on which relief can be granted. See Ellis v. United States Postal Service, 784 F.2d 835, 839-840 (7th Cir. 1986).

Next, Runyon contends "Plaintiff's State Common Law Claims are Preempted by the PRA and the CSRA." (Def.'s brief at 8.) Causes of action nine through fifteen sound in state tort law.

Taylor contends the court has jurisdiction over her tort claims under the FTCA. However, the comprehensive scheme provided by the PRA and CSRA preempts her claims under the FTCA. American Postal Workers, 940 F.2d at 708, 709; Kroll v. United States, 832 F.Supp. 199, 202-203 (W.D.

[1]The procedural rights referenced in her sixth cause of action are presumed to exclude rights under the constitution, since

Mich. 1993), aff'd, 58 F.3d 1087 (6th Cir. 1995).

Finally, Runyon contends "The Court Lacks Jurisdiction Over Plaintiff's State Tort Claims Against Marvin T. Runyon In His Official Capacity." Runyon correctly points out that the Postmaster General is not a proper party for a suit brought under the FTCA. See Allgeier v. United States, 909 F.2d 869, 871 (6th Cir. 1990); Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1254, (2d Cir. 1975).

In summary, causes of action nine through fifteen of the complaint fail to state a claim.

## Taylor's Motion

Rule 12 (b) (6) permits a defendant to move for dismissal of the complaint for failure to state a claim on which relief can be granted. See Fed.R.Civ.P. 12 (b) (6) advisory committee's note. Taylor's attempt to use it to strike Runyon's motion is procedurally incorrect.

Since a motion to dismiss is not a pleading, Taylor's Rule 12 (f) motion to strike the statement of facts contained therein is also inappropriate. See, e.g., Knight v. United States, 845 F. Supp. 1372, 1374 (D. Ariz. 1993), aff'd 77 F.3d 489 (1996).

## Recommendation

It is recommended that Runyon's motion (doc.15) to dismiss Taylor's constitutional and state tort claims (causes of action 1, 4, 5, and 9 through 15) be granted. It is recommended that

motion (doc.14) to dismiss Ruyon's motion and to strike his statement of facts be denied.

Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F,2d 947 (6th Cir. 1981).

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**CENTRAL REGIONAL OFFICE**

| | |
|---|---|
| ROCCINE TAYLOR, Appellant, | )DOCKET )NUMBERS )CH-0752-96-0267-I-1 |
| v. | )CH-0752-96-0740-I-1 |
| UNITED STATES POSTAL SERVICE, Agency, | )DATE:NOV.21,1996 |

Roccine Taylor, Garfield Heights, Ohio, pro se
Linda J. Armstrong, Cleveland, Ohio, for the agency

BEFORE
Phillip Miller
Administrative Judge

## INITIAL DECISION

### INTRODUCTION

The appellant was a Distribution Clerk with the Cleveland, Ohio Post Office. ON February 9, 1996, the appellant appealed two consecutive suspensions to the Board. On June 14, 1996, the agency removed the appellant. She appealed that action on June 17, 1996.

For the reasons set forth below, I find that the two suspensions constitute a suspension of over 14

also find that the appellant's removal is within the Board's jurisdiction. *See* 5 U.S.C.A. §§ 7511-7513 (West 1996). The appeals were jointed for adjudication and the hearing requested by the appellant was held on October 22, 1996.

The suspension is REVERSED. The removal is AFFIRMED.

## BACKGROUD

The appellant was assigned to Cleveland's Lyndhurst-Mayfield Station. She was absent from duty for a few days in late December 1995, and initially did not receive pay for the time she was absent. On Friday January 12, 1996, the appellant's daughter, Briggitte N. Buchanan, called John H. Bradfield, Supervisor, Main Office Window Service, a personal acquaintance of Ms. Buchanan and the appellant, and asked him if he could determine why the appellant had not been paid for the time she was absent. Although denied by Ms. Buchanan, Mr. Bradfield asserts that Ms. Buchanan stated words to the effect that that she had a gun and would "take care of" the station management if her mother did get paid for the she was off. Mr. Bradfield immediately notified the Lynhurst-Mayfield Station manager of the perceived threat and management officials then notified the Postal Inspection Service.

A postal inspector interviewed Mr. Bradfield who the called the appellant to obtain Ms. Buchannan's phone number. He advised the appellant that the postal inspector wanted to contact

gave Mr. Buchaana the requested phone number. Later, the appellant went into a utility room where she had a discussion with Clyde Brown, a maintenance worker. Shortly thereafter the appellant left the area and Mr. Brown told Barbara Shirley, Supervisor, Collection and Delivery (the appellant's supervisor), that the appellant told him of her daughter's call to Mr. Bradfield and stated that if anything happened to her daughter, she was going to shoot "that guy," meaning Mr. Bradfield. The appellant apparently worked Saturday January 13, until 1:30 p.m. when she was notified by telephone by a Supervisor, Ms. Reeves, that she was being placed on emergency suspension.

The agency notified the appellant in writing on January 15, 1996, that she was suspended effective January 13, 1996 at 1:30 p.m. "until advised otherwise" because "a member of [her] family made life threatening statements directed at [the appellant's] immediate supervisor." The following day, January 16, 1996, the agency issued a letter rescinding the January 15th letter and suspending her effective January 16, 1996, because the appellant was "overheard boasting of the statements made by [her] family member" and for making "remarks threatening the safety of the supervisor." *See* notices attached to suspension appeal. The appellant asserts that the agency violated her rights as a preference eligible in effecting the suspensions. The agency asserts that the Board lacks jurisdiction over the suspensions because neither suspension was for more than 14 days and, even if the appellant was suspended for

more than 14 days, the suspensions were canceled and the appellant made whole prior to the time the appellant filed her appeal. The agency investigated the threats allegedly made by the appellant and on May 11, 1996, proposed the appellant's removal based on the charges of conduct unbecoming a postal employee and threatening harms to postal employees.

The appellant replied orally to the notice and on June 8, 1996, Mr. James OBlock, Manager, Customer Service Operations, Cleveland District, issued a Letter Decision sustaining the charges and effecting the appellant's removal on June 14, 1996.

## SUSPENSION ANALYSIS AND FINDINGS

Only those matters for which a right of appeal is specifically granted by law, rule, or regulation may be appealed to the Board. 5 U.S.C.A. §7701 (a) (West 1996). Proving jurisdiction is the appellant's burden by a preponderance of the evidence. 5 C.F.R. § 1201.56 (a)(2) (1996). Covered employees, such as the appellant, are entitled to appeal adverse actions, including suspensions of more than fourteen days, to the Board. Moreover, covered employees are entitled to certain statutory protections including 30 days advance written notice, a reasonable time to answer, orally and in writing, the reasons therefore at the earliest practicable date. 5 U.S.C.A. § 7511 (a)(1) (West 1996). The agency failed to follow adverse action procedures in appellant was suspended for more than 14 days.

An agency cannot defeat Board jurisdiction by imposing two short suspensions for the same cause.

*See Klimek v. Department of the Army*, 3 M.S.R.R. 139, 142 (1980) (the Army imposed nonconsecutive suspensions based on the same reason). The record does not reflect a reason for the appellant's suspension on January 13th. The written suspension notice of January 15, 1996 addresses only Ms. Buchannan's conduct but not the appellant's. The January 16, 1996 notice of suspension addresses both Ms. Buchannan's and the appellant's conduct but gives no reason for canceling the first suspension. The circumstances of the suspensions, as discussed below, lead me to the conclusion that they were, in fact, for the same reason and, therefore, constituted a unified penalty.

Ms. Shirley testified that Mr. Brown told her of the appellant's alleged comments on the day they were made, January 13, 1996, and that she, in turn, told Deborah Noe, Manger, Customer Services, the same day. Thus, it appears that Ms. Noe was aware of the allegation by Mr. Brown at the time the appellant was suspended on January 13th. because it is more reasonable to suspend an employee for her own threatening conduct than the conduct of another, I conclude that it is more likely that the appellant was suspended for her own alleged comments than for her daughter's comments. The first suspension was likely canceled when the agency noticed that the appellant had no been given a valid reason for the suspension. Thus, I further conclude that the suspension began on January 13, 1996 and ran for

The agency representative asserted that the suspension was canceled on January 30, 1996[1], and "Appellant was provide with a salary advance in accordance with the wages she had minded." The agency acknowledges that the earliest the appellant was notified of this action was February 2, 1996, when she visited the labor relations office.[2] I note that on January 30, 1996, a labor relation specialist took action to place the appellant in an administrative leave status effective retroactively to January 16, 1996. See suspension file tab 7, Agency's Motion to Dismiss, exhibit 3. Under Board case law, however, a suspension is not ended until the condition precedent set forth in the notice is satisfied. *See Jones v. United States Postal Service,* 55 M.S.P.R. 491 493 (1992) Here, the appellant was advised that her suspension would run until she was "advised otherwise." The appellant asserts that she was not notified until March 8, 1996, that she would receive back pay for the time she was suspended, and no evidence refutes that statement.

The agency further asserts that the Board also lacks jurisdiction over the suspensions because it canceled both actions and made the appellant whole[3]. Jurisdiction turns on the state of the facts as they stood when an appeal is filed. "Only if the agency returns the appellant to the *status quo ante*, in the same manner as it would have to do in compliance

[1] This assertion was made in support of the agency's argument that the second suspension was only 14 days long.

[2] The notification allegedly was verbal. There is no indication that agency ever issued a written notice canceling any suspension.

with a final Board order, though, is the appeal truly rendered moot." *Merzweiler v. United States Postal Service*, 69 M.S.P.R. 274, 277 (1996). Here, the appellant was not restored to the *status quo ante*). Even assuming that the agency had a compelling reason for failing to return the appellant to duty, 4 it did not award her all of the back pay to which she was entitled.

Both the appellant and her supervisor, Ms. Sharon testified that the appellant was scheduled to work January 15, 1996, a holiday, and the agency offered no evidence in rebuttal. Further, the appellant testified that she did not receive back pay for the overtime she would have worked but for her suspension. This assertion appears to be supported by the agency's Gross Data Information Report and was unrebuted by the agency. *See* suspension file tab 10, exhibit #1; PSDS hours Adjustment Reported, Agency file, tab 7, Exhibit #3. The reports reflect that the appellant received significantly more

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[3] In her March 25, 1996 response to the agency's motion, the appellant argues that the initial notice of January 15, 1996, was procedurally defective, that she was advised on February 5, 1996 that she would receive back pay, but only from January 29, 1996; that it was not until March 8, 1996 that she was advised that she would receive back pay beginning with "pay period 3"

4 An agency may establish a compelling reason for not returning an employee to *status quo ante. Dalton v. Department of Justice*, 66 M.S.P.R. 429 (1995). *See also Jackson v. Department of the Air Force*, 61 M.S.P.R. 432 (1994.

pay for the periods she was on duty than of the period she was suspended. Because the appellant was not made whole through the date of her removal, I find that the Board has jurisdiction over her suspension. Because the agency did not follow adverse action procedures in effecting the suspension, I find action procedurally defective and it is reversed.

## REMOVAL ANALYSIS AND FINDINGS5

The May 11, 1996, Notice of Charges identified Charge 1 as "Conduct Unbecoming a Postal Employee" and Charges 2 as "Threatening Harm to Postal Employees." The supporting specifications were contained in an extensive narrative describing events over several months including references to both the appellant and her daughter. The notice referenced a statement allegedly made by Ms. Buchanan in December 1995, in which, referring to the appellant's supervisor, Chris Cooper, she stated she was "gonna give him hell;" Ms. Bkuchannan's and the appellant's "extensive military background;" the appellant's "assaultive behavior by throwing a clipboard at another supervisor6;" a "tiff" between the appellant and another unnamed employee; the appellant's allegation of an "assault" by a supervisor of which an investigation developed no supporting evidence; Ms. Buchannan's alleged threat of January 12, 1996; an otherwise unspecified January 16, 1996 report that the appellant had made "threats

employees;" and the appellant's alleged discussion of her daughter's alleged threats with other employees.

From my review of the proposal notice, I find that the only conduct with which the appellant is specifically charged is that, on January 12, 1996, the appellant stated that if her daughter got into trouble, she would "shoot Bradfield." The agency has the Burden of proving this specification and of showing that the specification supports one or both of the charges by a preponderance of the evidence. 5 C.F.R. § 1201.56 (1996)7.

The agency introduced no evidence that the appellant made any threat-like comments "while talking with several Lyndhurst-Mayfield employees" as alleged in the proposal notice. The only evidence supporting the assertion that the appellant made the comment is the testimony of Ms. Shirley and a hand-written note by Clyde Brown8, Custodian, introduced as Join Exhibit 1 at the hearing. Ms. Shirley testified that on January 13, 1996, she called the appellant to a phone to take a call from Mr. Bradfield, and that a short time later

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5 The agency failed to provide an evidence file after two orders to do so and failed to respond to any of several motions filed by the appellant. Accordingly, I sanctioned the agency by denying the agency the right to introduce evidence or to call witnesses in support of its case in chief. The evidence relied upon in sustaining the removal action was introduced by the appellant or obtained from witnesses called by the appellant.

6 This occurred during the appellant's "[attempt] to learn supervision."

she went to a utility room and found the appellant talking to Mr. Brown about the comments her daughter was alleged to have said; that after the appellant left the area, Mr. Brown told her that the appellant told him that if anything happened to her daughter she (the appellant) was going to shoot Mr. Bradfield. Ms. Shirley testified that Mr. Brown knew the name of Mr. Bradfield only because the appellant used it. The hand-written statement of Mr. Brown is dated "1-16-96" and reads as follows: "On 12 of Dec 96 [sic] Miss Roccine stated to me Clyde Brown that if something happen[ed] to Brigitte, that [sic] was going to shoot Mr. Bradfield." The appellant testified that she did not make the remarks attributed to her.

Because the testimony of the appellant contradicts the evidence submitted by the agency on a central issue, credibility findings must be made in accordance with *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987), *modified*, 54 M.S.P.R.58(1992), *rev's and remanded on other grounds, sub nom. King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994). Factors that must be considered, if applicable, include (1) the opportunity and capacity of the witnesses to observe the event or act,, (2) the

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7 A preponderance of the evidence is: "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient find that a contested fact is more likely to be true than untrue." 5 C.F.R. §1201.56 (c)(2) (1996).

8 Although requested as a witnesses by the appellant, Mr. Brown was on sick leave pending retirement and the agency failed to produce him.

character of the witnesses, (3) the effect of any prior inconsistent statement, (4) the possibility of bias on the part of a witness, (5) contradiction by or consistency with other evidence, (6) inherent improbability of an event occurring in the manner described in the testimony, and (7) the demeanor of the witnesses. *Hillen,* 35 M.S.P.R. at 458-62.

Greater weight is normally given to the testimony of first-hand witnesses than to hearsay testimony or unsworn written statements. *See Reniere v. Department of Agriculture*, 62 M.S.P.R. 648, 653 (1994). In this case, however, the attendant circumstances lead me to the conclusion that the evidence presented by the agency is more credible than the testimony of the appellant. Although the written statement of Mr. Brown is less than precise, it unmistakable references the incident between Ms. Buchanan and Mr. Bradfield. The only way Mr. Brown could have learned of the incident that day was through the appellant. Mr. Brown's written statement lends credence to Ms. Shirley's testimony that he advised her of the perceived threat. Accordingly, I find that the agency has supported its assertion that the appellant said she would shoot Mr. Bradfield if anything happened to her daughter.

Before the comment can be found to constitute a threat, it must meet the "*Metz* test." *See Metz v. Department of Treasury*, 780 F.2d 1001, 1004 Fed. Cir. 1986: *Battle v. Department of Transportation*, 63 M.S.P.R. 403, 406 (1994). Under *Metz* the evidentiary factors in deciding

(1) The listener's reactions;
(2) The listener's apprehension of harm;
(3) The speaker's intent;
(4) Any conditional nature of the statement; and
(5) The attendants circumstances.

*Metz*, 780 F.2d 1002. Although the person against whom the alleged threat was made may not have personally heard the statement, consideration is given to his reactions. *Battle*, 63 M.S.P.R. at 406.

Mr. Bradfield testified that the appellant had worked for him at one time and that they had had an "intimate relationship" and that he was not concerned for his safety. Mr. Brown, however, displayed concerns for the safety of Mr. Bradfield by advising Ms. Shirley to report the comments to Ms. Noe and other officials displayed a genuine concern for the safety of their employees by reporting the incident to the Inspection Service and by removing the appellant from the work place. Although the remarks were conditional, whether something happened to the appellant's daughter, those conditions were not within the control of Mr. Bradfield. The appellant's comments implied serious harm or death to Mr. Bradfield because he appropriately alerted authorities of threat made by her daughter.

I find that the agency has satisfied the *Metz* test. Accordingly, I find that the agency has supported Charge 2, Threatening Harm to Postal Employees, by a preponderance of the evidence. Charge 1, Conduct Unbecoming a Postal Employee, requires a lesser showing on improper conduct than

charge. Accordingly, I find that the specifications set out by the agency support both charges and both charges are sustained.

Affirmative defenses

This appellant alleges that her removal was in reprisal for her having previously filed discrimination complaints against the agency and that it constitutes discrimination
Based on her sex. The appellant has not supported these affirmative defenses. The appellant did not show that the agency has not removed any employee for having made similar remarks or that it lacked sufficient motivation for its action.

An allegation of reprisal is affirmative defense for which the appellant bears the burden of proof by a preponderance of the evidence. 5 C.F.R. § 1201.56 (a) (2) (1996). In order for an appellant to prevail on a contention of illegal retaliation, she has the burden of showing that: (1) she engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could, under the circumstances, have been retaliation and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Rockwell v. Department of Commerce*, 39 M.S.P.R. 217,222 (1988), citing *Bodinus v. Department of the Treasury*, 7 M.S.P.R. 536, 541 (1981), *aff'd* 785 F.2d 323 (Fed. Cir. 1985), and *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

When the first three tests are met, as they are in this case, "a careful scrutiny fo the intensity of [an agency official's] motive to retaliate is necessary under test (4) to be weighed with the gravity of the misconduct charged, or inadequacy of the performance of duties, so that the trier of fact can make an informed and reasoned determination whether the 'nexus' exists." *Warren*, at 658. In *Warren* the court went on to state that an action against an employee should be sustained if "an imaginary supervisor who knew nothing of the [protected activity] would have been led by the objective facts to find petitioner's performance inadequate." *Warren* at 659.

I find that the seriousness of the misconduct weighs in favor of removal of the appellant, even in the presence of a motive for retaliation. I further find that the appellant has not shown a nexus between her removal and her filing of discrimination complaints.

To establish a prima facie case of discrimination on the basis of disparate treatment, the appellant must show that: (1) he of she is a member of a protected group; (2) he of she was similarly situated to an individual who was not a member of he/her particular protected group; and (3) she or she was treated more harshly of disparately than that individual. *See Fenn v. Department of the Army*, 35 M.S.P.R. 362, 366 (1987). The appellant must also show that the difference in treatment was based on the intent to discriminate. *Id.* To be similarly situated, the appellant and a comparative employee or employees must have reported to the same supervisor, been subjected to the same standards

discipline, and engaged in similar conduct without differentiating or mitigating circumstances distinguishing their misconduct or the appropriate discipline for it. *See, e.g., Wynne v. Department of the Army*, 46 M.S.P.R. 320, 327 (1990), *aff'd*, 940 F.2d 677 (Fed. Cir.1991)(Table).

Because the appellant has offered no evidence in support of her bare assertion of sex discrimination, I find that she has not supported this affirmative defense by a preponderance of the evidence.

Efficiency of the service-Nexus

"[A]n agency may take an action covered by [subchapter 75 of title 5 of the United States Codes] against an employee only for such cause as will promote the efficiency of the service." 5 U.S.C.A. § 7513 (West 1980).

> Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303 (1981). A nexus exists between an adverse action and the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish her duties satisfactorily or to some other legitimate government interest. *Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985).

The appellant's comments were made concerning a coworker and resulted in a disruption of the agency. Accordingly, I find that her misconduct had a direct nexus to the efficiency of the service.

Efficiency of the service-Penalty

The particular sanction imposed may not be arbitrary or unreasonable. *Douglas*, 5 M.S.P.R. at 301, 310. Another formulation of this test is whether "managerial judgement has been properly exercised within tolerable limits of reasonableness." *Douglas*, 5 M.S.P.R. at 302. The sanction imposed must be in consideration of the applicable factors set forth in *Douglas*, M.S.P.R. at 305. Due deference is given to the agency's discretion in exercising its obligation to maintain employee discipline and efficiency. *Richard v. Department of the Air Force*, 43 M.S.P.R. 303, 308 (1990), *aff'd* 918 F.2d 185 (Fed. Cir.1990).

The seriousness of the appellant's conduct is the over riding factor here. Threatening the life of a coworker outweighs any factor that may weigh in favor of the appellant. The Board has consistently held that threats against other employees warrant removal. *Battle vs. Department of Transportation*,

M.S.P.R. 303, 308 (1990), *aff'd* 918 F.2d 185 (Fed. Cir.1990).

The seriousness of the appellant's conduct is the over riding factor here. Threatening the life of a coworker outweighs any factor that may weigh in favor of the appellant. The Board has consistently held that threats against other employees warrant removal. *Battle vs. Department of Transportation*, 63 M.S.P.R. 403, 410 (1994) (threat of "hot piece of lead" for supervisors warranted removal); *Sims v. Department of Defense*, 58 M.S.P.R. 131 (1993) (words to the effect "I'll be looking for his ass" warranted removal); and *Facas v. United States Postal Service, 35* M.S.P.R. 426, 430-31 (1987) (statement to fellow employee that he was going t butcher the postmaster and kill certain others, warranted removal). I find that the removal of the appellant was within the tolerable limits of reasonableness.

## DECISION

The agency's suspension action is REVERSED.

The agency's removal of the appellant is AFFIRMED.

## ORDER

The agency is ORDERED to cancel the suspension effective January 13, 1996 to the date of removal. This action must be accomplished no

decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its intentions.

## INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief pursuant of Section 6 of the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701 (b)(2)(A) in light of the affirmed removal.

FOR THE BOARD: Phillip Miller
Administrative Judge

## NOTICE TO APPELLANT

This initial decision will become final on December 26, 1996, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, of the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to th agney, your petition will be rejected and returned to you.

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Offices of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

## JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Actor under the Rehabilitation Act, you must file your appeal with the appropriate United

If you choose not
decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
For the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court appeals no later than 30 calendar days after the date this initial decision becomes final.